Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Implementation of the	)	CC Docket No. 96-115
Telecommunications Act of 1996	)	
	)	
Telecommunications Carriers' Use	)	
of Customer Proprietary Network	)	
Information and Other Customer Information;	)	
	)	
Implementation of the Non-Accounting	)	
Safeguards of Sections 271 and 272 of the	)	CC Docket No. 96-149
Communications Act of 1934, As Amended	)	

COMMENTS OF
MPOWER COMMUNICATIONS CORP.

I. Introduction and Summary

The Federal Communications Commission ("Commission") initiated a rulemaking proceeding on customer proprietary network information ("CPNI") and requested comments on the obligation of telecommunications carriers under Section 222 of the Telecommunications Act of 1996 ("1996 Act") and related issues. In particular, the Commission requested comments on whether an opt-in customer approval for use of CPNI directly and materially advances its interests in protecting privacy and promoting competition.

Mpower Communications Corp. ("Mpower") believes that there is a basic underlying issue regarding the definition of CPNI which must be dealt with before the best solution to the treatment of CPNI can be determined. Specifically, as explained in

more detail below, CPNI encompasses both purely technical information regarding facilities, CPNI – facilities or Customer Facilities Information ("CFI") – and CPNI – usage or Customer Usage Information ("CUI").

Mpower believes that whereas opt-out approval would be adequate for CFI/CPNI – facilities information, that opt-in customer approval is required before use of CPNI usage information/CUI in order to protect customer privacy rights. Opt-in approvals can be narrowly tailored to advance government interests in protecting these especially sensitive areas of customer privacy and to advance competition.

II. Government Interests Under §222

A. Restrictive Statutory Language

In §222, Congress took a highly protective view of customer privacy rights regarding CPNI. It began by saying in §222(a) that "Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of…customers." In §222(c)(3), Congress provided, in general, that CPNI was to be disclosed "upon affirmative written request by the customer," the most restrictive language possible. Further, in §222(d)(3), Congress provided that even when the customer initiates the call to the carrier, CPNI can be used only "for the duration of the call, if…the customer approves of the use of such information." Likewise, aside from the requirements of E911 and related safety or emergency use, pursuant to §222(f), wireless location information may not be used "without the express prior authorization of the customer."

B. Range of Privacy Interests

Congress and the Commission identified a range of privacy interests and treated each somewhat differently. First, areas were identified where no privacy rights or only

limited privacy rights are implicated, such as aggregate information or subscriber list information. In these areas Congress required that such information be made available on a non-discriminatory basis. For example, in §222(c)(3), Congress provided that aggregate customer information may be used for purposes other than provisioning service and related "only if [the carrier] provides such aggregate information to other carriers…on nondiscriminatory terms and conditions." Pursuant to §222(e), subscriber list information shall be provided "under nondiscriminatory and reasonable rates, terms, and conditions" to any person requesting it for the purpose of publishing directories.

Where privacy interests exist but service is being received from that carrier, it is inferred that approval exists to use CPNI to provide that service and to market that service to that individual, regardless of whether such approval was ever directly sought. Likewise, where services require use of CPNI to provision them, such as inside wire, or are dependent upon services which are being provided, such as "features," e.g. call waiting, caller ID, call forwarding, etc., a carrier is allowed to use CPNI without any formal approval process to market and provision those products.

In addition, there are exceptions in the law (§222(d)(2)&(4)) allowing use of CPNI to protect the carrier and/or users from fraud, abuse, etc. and to protect the public safety more generally.

It is only the use of CPNI to target customers for the sale of new products not yet purchased from any carrier that the issue of approval of CPNI even becomes an issue. This has clear competitive implications. Also, as noted above, some aspects of CPNI involve information fundamental to customer privacy (CUI) and some do not (CFI). Thus, approval may be tailored even more narrowly. Further, Mpower believes that

competitive issues are clearly implicated by the nature of the approval given to use CPNI, specifically, whether approval involves "opt-in" or "opt-out" procedures.

III. Definition of CPNI

Section 222(h) defines customer proprietary network information to mean:

> [I]nformation that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service…that is made available to the carrier by the customer solely by virtue of the carrier – customer relationship.

Mixed in this definition are "technical configuration, [and] type," along with "quantity…destination, location, and amount of use." Technical configuration and type and number of line(s) – CFI – should not be considered private information requiring opt-in approval. This information is perhaps most analogous to unlisted number information. Numbers are listed unless one opts-out.

What is vitally important personal information, however, is information about who one calls, how often, where, etc., i.e. CUI. If the police want to obtain this type of information, they need to obtain a subpoena to get a "pen register" wire tap. In fact, this information is so personal and so revealing that the Commission found it necessary to make a rule, 64.2005(b)(2), that CPNI may not be used to "identify or track customers that call competing service providers"! The mere need for such a rule illustrates how anticompetitive the use of this type of CPNI can also be.

IV. Opt-in and Opt-out Approvals

Where CPNI deals merely with network requirements – CFI - such as number and type of lines, it should be available to carriers for marketing purposes based on an "opt-out" style approval. Where CPNI is highly protected and extremely invasive "usage"

information or CUI, as identified above, it is entitled to fully knowing "approval," as previously determined and explained by the Commission.[1]

As noted, the statute contains several instances of specific language which is highly restrictive and requires express approval from customers to use CPNI. As the Commission explained, common sense usage, as well as the dictionary definition of "approval" suggests "knowing" approval, which is impossible to assure when opt-out mailings may not be received and even more likely, may not be read.[2] Certainly information which police or other enforcement personnel must obtain a subpoena to obtain is sensitive enough that the customer should be entitled to control it by a process that provides for knowing approval, through an opt-in procedure, before carriers are allowed to use it freely.

It may be useful to note here that the European Union ("EU") member states, in particular, are increasingly concerned about such CUI privacy rights, as technology moves forward in such a way as to eliminate barriers to the electronic transfer of personal data between and among the nations of the world. As a result, the EU Parliament is currently reviewing legislative proposals (a "Directive") intended to update privacy legislation for telecommunications and other electronic communications. The intent is to make it technologically neutral and to assure the privacy of EU citizens as various kinds of data - specifically traffic data, location, user and content information - become more and more indistinguishable from each other because of changes in technology.[3] As a

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[1] *Second Report and Order and Further Notice of Proposed Rulemaking,* "CPNI Order," CC Doc. 96-115/96-149, Rel. 2/26/99, ¶¶ 91-92.

[2] *Id*.

[3] 13 July 2001, Report on the proposal for a European Parliament and Council directive concerning the processing of personal data and the protection of privacy in the electronic communications sector; Session Document A5-0270/2001.

result of these concerns, the proposed Directive emphasizes "opt-in" procedures wherever practical, only allowing personal usage data to be stored for the limited period of time necessary for the provisioning of services and for billing. To use such information for marketing purposes will likely only be allowed if the subscriber has affirmatively agreed, based upon "accurate and full information" being provided regarding the types of further processing to be done and the subscriber's right not to consent and to withdraw consent to such use. Further, use of traffic data for marketing will likely require periodic notices regarding the types of data processing being done and the duration of such efforts and will need to be erased or made generic after such services are provided.

Thus, major trading partners of the U.S. consider usage CPNI/CUI to be highly sensitive information necessarily under the knowing control of its subject. According to the U.S. Department of Commerce, the present EU Directive on Data Protection "requires that transfers of personal data take place only to non-EU countries that provide an 'adequate' level of privacy protection." [4] Consequently, U.S. protection of such data at a lesser level than an "opt-in" process would likely give rise to significant concern in Europe. As we become increasingly interdependent, such concerns deserve serious consideration in drafting rules which may have an impact outside the U.S.

[4] July 21, 2000, *Safe Harbor Privacy Principles*, U.S. Department of Commerce.

V. Effect on Competition

It also seems clear that the decision to use "opt-in" versus "opt-out" would have competitive implications and that Congress was sensitive to such implications in drafting §222. As the Commission noted in its NPRM, "[w]ith Section 222, Congress expressly directs a balance of 'both competitive and consumer privacy interests with respect to CPNI.'"[5] In addition, as pointed out by the Minority in the 10th Circuit Court of Appeals Opinion in U.S. West v. FCC:

> [I]t is impossible to ignore the fact that §222 was enacted as part of the Telecommunications Act of 1996, the entire purpose of which was '[t]o promote competition…in order to secure lower prices and higher quality services for American telecommunications consumers.' Pub. L. No. 104-104, 110 Stat. 56, 56 (1996); see In re Graven, 936 F.2d 378, 385 (8th Cir. 1991)(when interpreting statute, court looks not only to its express language, but also to overall purpose of act of which it is a part). Indeed, the notion that promotion of competition was one of Congress' purposes in enacting §222 is entirely consistent with the plain language of the statute itself. By restricting carriers' usage of CPNI, §222 helps diminish anticompetitive barriers in the telecommunications market by requiring carriers (both large and small) to rely on methods other than analysis of existing CPNI to promote their products, and thereby reduces the possibility that a carrier will easily convert its existing customers for a particular product or service into customers for its new products or services.[6] (Emphasis added.)

Further, Mpower agrees with the Commission that:

> [T]he ability to use CPNI from an existing service relationship to market new services to a customer bestows an enormous competitive advantage for those carriers that currently have a service relationship with customers, particularly incumbent exchange carriers and interexchange carriers with a large existing customer base. This, in turn, poses a significant risk to the development of competition.[7]

Many new products and services are developed by or because of the efforts of competitive carriers. Nevertheless, once large incumbent carriers adopt such products

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[5] *NPRM*, ¶ 2, fn 6, citing the Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess., 1 (1996).

[6] *U.S. West v. FCC*, 182 F.3d 1224, 1245 (10th Cir. 1999).

[7] *Order on Reconsideration and Petitions for Forbearance*, "CPNI Order on Reconsideration," CC Doc. 96-115/96-146, Rel. 9/3/99, ¶ 55.

and services to compete with newer carriers, unless restrained by fully knowing customer consent, the large incumbent carriers are put in the position of merely "mining" existing customer databases. There they could obtain vast amounts of specific, individual usage information, allowing them to target customer profiles most appropriate to interest in given new products. Compare this scenario to struggling new carriers with limited numbers of customers and therefore, limited customer databases.

Given these disparities and the highly useful nature of the information, were it not for the highly proprietary nature of usage CPNI/CUI, Mpower would suggest that such data be made available to CLECs as well as ILECs and IXCs. Under the circumstances, however, Mpower believes that usage CPNI/CUI must be accessed only after "opt-in" approval by the customer.

Mpower is sensitive to the Court's concern about the rights of carriers to "targeted" as well as "broadcast" speech. Nevertheless, when rights to commercial speech are weighed against fundamental privacy rights of individuals, in an era when technology makes it increasingly difficult to distinguish between usage and content, privacy rights certainly must win out. In addition, as the Minority stated in the 10th Circuit Court of Appeals Opinion in U.S. West v. FCC, "§222 arguably promotes the First Amendment rights of consumers by allowing them to call whom they wish when they wish without fear that their calling records will be disclosed to others."[8] Add to this the strong anticompetitive effect of allowing large incumbent carriers to use sensitive information obtained under monopoly conditions and the issue seems indisputably weighted toward the customer's right to privacy and control.

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[8] *U.S. West v. FCC* at 1245-46.

V. Present "Winback" Abuses

The threat to competition from the ready ability of large incumbents to use CPNI usage information (CUI) is foreshadowed by evidence of present abuses in the use of carrier CPNI, under §222(b), to retain customers after they have made a decision to transfer their service to a competitive carrier. As Mpower and others have stated in Comments[9] filed in various states, BellSouth, in particular, very quickly "allows" wholesale requests by CLECs to transfer customer service to migrate to the retail side of the business. As a result, strong efforts are frequently made to retain the customer before the transfer of the line to the CLEC is even completed.

Sometimes these winback efforts are made in conjunction with the questionable handling of a "local freeze" – of which the customer frequently is not even aware. Sometimes transferring customers are targeted for big discounts, which do not seem to be reflected in tariffs, and sometimes the CLEC's network reliability is denounced, despite the fact that with UNE-based CLECs, network reliability is largely dependent upon the ILEC.

Although the Commission allows ILECs to "regain" customers subsequent to the transfer to competitors, the Commission has indicated that attempting to "retain" customers under the circumstances frequently complained of by CLECs "would likely violate section 222(b)."[10]

[9] *See, e.g., Comments of Mpower*, Doc. 14232U, 9/7/01 (Ga. Winback Docket); *Supplemental Comments of Mpower*, Doc. 6863-U, 9/18/01(Ga. BellSouth 271, pulling of Mpower support).
[10] CPNI Order on Reconsideration, CC Doc. 96-115/96-149, Rel. 9/3/99, ¶ 74.

In an effort to reduce such anticompetitive behavior, Commissions in Louisiana and South Carolina have recently required a "winback window" before BellSouth can attempt to regain customers lost to CLECs. The Lousiana Commission prohibited:

> BellSouth from engaging in any win back activities for 7 days once a customer switches to another local telephone service provider, including (1) prohibiting BellSouth's wholesale divisions from sharing information with its retail divisions, at any time, such as notice that certain end users have requested to switch local service providers, and (2) prohibiting BellSouth from including any marketing information in its final bill sent to customers that have switched providers.[11]

Likewise, it is reported that:

> South Carolina…has restricted BellSouth from engaging in win-back activities for 10 business days[12] after customers switch their local service to a competitor…The PSC also prohibited BellSouth from including any marketing information in the final bill it sends to customers who switched their service.[13]

Mpower believes that the positions taken by Louisiana and South Carolina on the "winback window" and prohibition of marketing information on the final bill are essential to fair competition and should be adopted by this Commission.

VI. Conclusion

Thus, Mpower believes the Commission should clearly distinguish between CPNI that reflects Customer Facilities Information (CFI) and CPNI that reflects Customer Usage Information (CUI) and should then adopt an "opt-in" provision for approval to use the highly private and sensitive CUI. In addition, because of current abuses in the use of CPNI, Mpower recommends that the Commission adopt a 10 day "win-back window" from the start of service with the CLEC, during which an ILEC losing a customer to a

[11] BellSouth 271 Application, La. PSC Order No. U-22252(E), 9/21/01.
[12] By e-mail of 11/1/01, David Butler, General Counsel, South Carolina PSC, reports that the vote was subsequently changed to reflect 10 calendar days after service begins with the CLEC. He also stated that the official written Order has not yet been issued but that it should be issued in approximately one week.
[13] Reported in Telecommunications Reports Daily, 10/22/01, p. 34; decision reportedly was in response to complaints by Southeastern Competitive Carriers Association, NewSouth Communications Corp. and TriVergent Communications.

CLEC may not use CPNI to engage in win-back activities, including a prohibition against including marketing information on the customer's final bill.

Respectfully submitted,

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